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No. ____

In The

Supreme Court of the United States

October Term, 1997

LAVOYD W. DOLLAR,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTIONS PRESENTED

I. Is materially an element of the offense of mail fraud under 18 U.S.C. § 1341?

(SUBSIDIARY QUESTION: Did the Fifth Circuit err in holding that there was no plain error in failing to properly submit the element of materiality to the jury in this case?)

II. Where a potentially prejudicial extrinsic or extrajudicial incident occurs during trial, and that incident may have been witnessed (and discussed) by one or more jurors and also generated substantial midtrial publicity, should the district court be required to conduct a complete investigation, including individual voir dire if appropriate, to determine the extent of any taint?

III. Where the district court reversibly erred in refusing to sever Petitioner out for separate trial?

(SUBSIDIARY QUESTION: What factors will justify severance based on misjoinder or prejudicial joinder, where the particular defendant under consideration is only a minuscule part of the set of events on trial?)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals decided and filed September 18, 1997.

OPINION BELOW

The opinion of the Court of Appeals, *United States v. Moser,* is published at 123 F.3d 813. A copy of the opinion of the Court of Appeals is attached as Appendix A.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on September 18, 1997. This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes at issue in Question 1, are set forth in Appendix B. United States Constitution Amendments V and VI, the constitutional provisions implicated in Questions 2 and 3, are set forth in Appendices C and D, respectively.

STATEMENT OF THE CASE

The United States District Court, Northern District of Texas, Fort Worth Division, had jurisdiction pursuant to Title 18, United States Code, § 3231.

A. Proceedings Below

On September 28, 1995, the petitioner, Lavoyd W. Dollar (hereafter "Petitioner") and co-defendants Billy Mack O'Neill, Franklin Rollin Johnston, Jerry Lynn Wilkins, Thomas D. Gandy, and Steven P. Moser were indicted in a 17-count indictment charging **1)** conspiracy, in violation of Title 18, United States Code, Section 371 (Count 1); and **2)** mail fraud, in violation of Title 18, United States Code, Sections 1341 and 2 (Counts 2 and 3 as to Johnston) (Counts 3 and 5 as to Wilkins) (Counts 4 and 5 as to Dollar) (Count 6 as to Moser) (Counts 7-10 and 13 as to Wilkins) (Counts 11-13 as to Dollar) (Counts 12 and 14-17 as to O'Neill) (Count 14 as to Moser) (Counts 15 and 16 as to Gandy).

From November 28 through December 18, 1995, Petitioner and the other defendants were tried by jury before the Honorable Joe Kendall in the Northern District of Texas, Dallas Division. On December 18, 1995, the jury returned a verdict of guilty against Petitioner on Counts 1, 4, 5, 11-13.

On April 22, 1996, Judge Kendall sentenced Petitioner to, among other things, a term of imprisonment of twenty-one months, to be followed by a term of supervised release of 3 (three) years. Petitioner filed a timely

Notice of Appeal, and a timely appeal to the United States Court of Appeals for the Fifth Circuit followed.

That court rendered its decision affirming in all things by judgment and published opinion dated September 18, 1997. *See United States v. Moser,* 123 F.3d 813 (5th Cir. 1997). (Copy of manuscript opinion attached as Appendix A.)

B. Statement of Relevant Facts

General facts

The following facts are taken from the opinion of the Court of Appeals in this case:

"In February of 1986, Appellant Franklin Rollin Johnston (Johnston) was engaged in the real estate business and suffered severe financial losses. Johnston attributed those losses on the downturn of the real estate market, oil business, and ultimately, the failure of the banks. After attending various seminars and conducting research, he became convinced that the Federal Reserve Act was illegal inasmuch as banks were creating money out of thin air and lending only their 'credit.'

"After having met Appellant Billy Mack O'Neill (O'Neill) in March of 1993, Johnston happened to meet O'Neill at a meeting involving the subjects of banking and money in May of 1993. O'Neill gave Johnston a packet of materials generated by the 'Family Farm Preservation' entity of Tigerton, Wisconsin. The packet contained several court cases, blank 'certified money orders' (CMOs), and articles explaining that banks legally cannot loan credit. The CMOs provided that they were payable:

> on demand, money of account of the United States, as required by law in Sect. 20 of Coinage Act of 1792 from the time of official determination of the substance of said money: or, in U.C.C. 1-201(24) Credit Money.

"The money order further provided that it was redeemable at full face value when presented to L.A. Pethahiah in Tigerton, Wisconsin. If a financial institution presented the money order to Pethahiah, the institution would then receive a certified banker's check (CBC) in the same amount as the CMO. The CBC also contained the above limiting language.

"Johnston gave the packet of materials to Appellant Jerry Lynn Wilkins (Wilkins), an attorney who Johnston had previously retained to do some work. Wilkins examined the materials and then advised Johnston, who in turn advised O'Neill, that he agreed with the information in the packet.

"Johnston then formed USA First, an unincorporated business organization in Waxahachie, Texas. O'Neill worked for USA First, and Wilkins moved his law office to the office of USA First. Johnston paid Wilkins $500 each week for the work he did for USA First. Each of those three men used CMOs from the Tigerton packet in an attempt to pay off debts with various lenders.

"Shortly thereafter, Johnston put together a packet almost identical to the Wisconsin packet and began to sell it out of the offices of USA First for $300. The packet instructed that the user could fill out the six enclosed CMOs in any amount to pay off particular debts. Like the Wisconsin CMOs, these CMOs contained the above-

quoted limiting language. The packet instructed the user to include 2-3 months extra interest and to ask for return of any overpayment. The institution to which a CMO was sent by certified mail was instructed to forward the CMO for redemption to O.M.B.-W.D. McCall at a post office box in Waxahachie. The institution would then receive in return an item entitled 'certified banker's check' (CBC) in the same amount as the CMO. The CBC would be signed by O'Neill. The institution was instructed to credit the CBC to the debtor's account. When the CBC was returned to USA First, O'Neill would stamp it 'paid in full.' There was no money behind the CMOs or CBCs. The packet itself referred to the CMOs as 'pretend money.'

"The Texas Department of Banking sent a cease and desist letter to O.M.B.-W.D.McCall, admonishing that it had information that the business was violating state law regarding the unlicensed sale of payment instruments. The letter explained that such a violation was a third degree felony. The warning in the letter was ignored, and USA First continued to sell the packets containing the CMOs.

"In December of 1993, the offices of USA First were searched and records were seized. Shortly thereafter, Leo Hoad (Hoad) began working for USA First. Apparently, O'Neill and Hoad had some differences, and as a result, O'Neill left USA First."

Moser, 123 F.3d at 818-19.

Other evidence

By dint of the global conspiracy charge which was brought in this case, Petitioner was tried with two other people – Gandy and Moser – whom he had never met or had any contact with prior to the bringing of the indictment in this case; and several persons – O'Neill and Wilkins – whom Petitioner had only a slight acquaintance with. Because Petitioner was erroneously joined with all these defendants for trial, the jury heard a plethora of often very prejudicial evidence which had nothing to do with Petitioner. This evidence included extensive evidence that an organization known as L.A. Pethahiah/ Family Farm Preservation was operating a similar, but separate, CMO/CBC operation in Tigerton, Wisconsin. Yet the government forthrightly admitted at the beginning of trial that the Pethahiah evidence had nothing to do with Petitioner.

Petitioner's jury also heard about very prejudicial information about one Allan Kramer – not charged in this case – who had used Pethahiah CMOs and CBCs, not only to pay off antecedent debt with financial institutions, but also to defraud two real, live individuals (who testified at this trial) by inducing those persons to sell their homes with these instruments in payment. Yet those individuals admitted that they had never met Petitioner and had never even heard of Petitioner.

Finally, Petitioner's jury was inundated with information about the individual uses of CMOs/CBCs by all of the other defendants in this case, with absolutely no evidence that Petitioner had anything to do with, or even

knew about, these persons, much less the particular transactions at issue.

REASONS FOR GRANTING THE WRIT

Overview

The first question presented goes to the very definition of, and proof required for, the widely used offense of mail fraud under 18 U.S.C. § 1341.[1] In this case, the Fifth Circuit found no plain error in failing to properly submit to the jury the element of materiality in a mail fraud prosecution because no Fifth Circuit case had squarely held that materiality was an element of the offense of mail fraud.

The Fifth Circuit's holding is in conflict with the weight of authority which holds that, in order to constitute "fraud," any alleged misrepresentations must be ***material.*** Thus, the weight of authority holds that a jury must find misrepresentations to be material before it may convict of fraud. The Fifth Circuit ruling in this case – that there was no plain error in not allowing a properly instructed jury to pass on the question of materiality in this case – is in contravention of this authority and of the rule announced by this Court in *United States v. Gaudin*, 515 U.S. 506 (1995). Particularly, the holding of the Fifth Circuit in this case is in direct conflict with decisions of the Ninth and the Tenth Circuits, which both require that

[1] The particular issue raised here would also have ramifications for the similarly worded and equally widely used wire fraud statute, 18 U.S.C. § 1343.

a jury pass on the question of materiality in a mail fraud prosecution. Because of this conflict of authority, and because of the widespread use of the mail fraud statute in federal prosecutions, this Court should grant certiorari in this case to resolve this question.

The second question presented is one which is of increasing importance in modern-day federal prosecutions, namely: what is the appropriate response to allegations that one or more members of a jury may have been exposed to a very prejudicial event (one which goes to the very security of the judge and jurors) and publicity regarding that event? Here, the wife of one of Petitioner's co-defendants was apprehended trying to enter the courthouse with a gun and ammunition, after alleged disgruntlement over how her husband's case was going. One or more of the jurors in this case may have witnessed the incident. Moreover, there was a barrage of publicity about the incident in both print and broadcast media. Yet the district court did nothing for a week after the incident, and even after a week did nothing more than dismiss, without questioning, the single juror that could be identified as having witnessed the incident.

The district court's response was wholly inadequate under this Court's precedents. In such circumstances, a district court is obliged to determine the extent to which such incidents and their attendant publicity have penetrated into the consciousness of the jurors in the case. Here, the district court did nothing more than dismiss the only juror to have been identified as having witnessed the incident; it did not question her to see whether others had witnessed the incident, or whether, in the week since the incident, she had discussed the incident with her

fellow jurors. Nor did the district court determine whether *other* jurors had been exposed to the incident or publicity about the incident.

This case provides an opportunity for this Court (acting both in its supervisory capacity and in its capacity to decide constitutional requirements) to revisit, and to clarify, the duties of federal district courts in such situations. Because of the importance of this question, and because the Fifth Circuit's decision in this case is in tension with decisions of this Court and other federal circuits, this Court should grant certiorari as to this question as well.

Finally, the last question presented – whether Petitioner was misjoined for joint trial, and whether his case should have been severed for separate trial – raises important questions as to the administration of justice in the federal system. Lengthy conspiracy "megatrials" with a number of defendants have become a commonplace in the federal system. Often, as here, these defendants do not even know each other. The government weaves together a number of defendants into a tenuous "conspiracy," thus forcing individual defendants to stand trial for much longer than their cases, tried individually, would take. Even more troubling, these lengthy joint trials are tremendously prejudicial to defendants like Petitioner who are but a minuscule part of the events on trial.

This Court has not revisited the issues of joinder and severance vis-á-vis single and multiple conspiracies in over fifty years, since the Court's decision in *Kotteakos v. United States*, 328 U.S. 750 (1946). In light of the increasing use of the mega-conspiracy device, this Court should

revisit and reiterate the principles of *Kotteakos* in light of modern-day prosecutorial practices. Furthermore, this case also gives this Court an opportunity to amplify upon the law of severance, which the Court last took up in *Zafiro v. United States*, 506 U.S. 534 (1993).

For these reasons, as more fully explicated in the Argument section below, this Court should grant certiorari to consider the following questions:

I. **Is materiality an element of the offense of mail fraud under 18 U.S.C. § 1341?**

(SUBSIDIARY QUESTION: Did the Fifth Circuit err in holding that there was no plain error in failing to properly submit the element of materiality to the jury in this case?)

II. **Where a potentially prejudicial extrinsic or extrajudicial incident occurs during trial, and that incident may have been witnessed (and discussed) by one or more jurors and also generated substantial midtrial publicity, should the district court be required to conduct a complete investigation, including individual voir dire if appropriate, to determine the extent of any taint?**

III. **Where the district court reversibly erred in refusing to sever Petitioner out for separate trial?**

(SUBSIDIARY QUESTION: What factors will justify severance based on misjoinder or prejudicial joinder, where the particular defendant under consideration

is only a minuscule part of the set of events on trial?)

Argument

I. Materiality is an essential fact necessary to proof of the offense of mail fraud set out in 18 U.S.C. § 1341; therefore, the Fifth Circuit erred in finding no plain error in the failure to properly submit the question of materiality to the jury.

Facts

In this case, Petitioner was charged with one count of conspiracy to commit mail fraud under 18 U.S.C. § 1341, and five substantive counts of mail fraud (of which counts he was convicted). The mail fraud statute may be violated by any use of the mails which (1) is in connection with "any scheme or artifice to defraud"; or (2) is "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *See* 18 U.S.C. § 1341. In this case, both the conspiracy count and the substantive mail fraud counts charged Petitioner and the other defendants with both the "scheme or artifice to defraud" prong, and the "false or fraudulent pretenses, representations, or promises" prong, of § 1341.

In its instructions, however, the district court instructed the jury on only the "scheme or artifice to defraud" prong, although it telescoped the "false or fraudulent pretenses, representations, or promises" prong into its instructions on the "scheme or artifice to defraud":

> The Mail Fraud statute, Title 18, United States Code, Section 1341, makes it a crime for

> anyone to use the United States mails in carrying out or attempting to carry out a scheme to defraud. For you to find a Defendant guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:
>
> > First: That the Defendant knowingly created or participated in a scheme to defraud, as alleged in the Indictment which is hereby referenced;
> >
> > Second: That the Defendant acted with a specific intent to commit fraud;
> >
> > Third: That the Defendant mailed something or caused another person to mail something for the purpose of carrying out or attempting to carry out the scheme.
>
> A "scheme to defraud" includes any scheme to deprive another of money, property, or of the intangible right to honest services by means of false or fraudulent pretenses, representations, or promises.
>
> A representation may be "false" when it constitutes a half truth, or effectively conceals a material fact, provided it is made with the intent to defraud.

Significantly, the instructions gave no definition of the term "material"; nor did the instructions require that qualifying misrepresentations be material. Indeed, the undefined requirement of materiality was apparently reserved to only ***omissions*** of material facts, not the affirmative misrepresentation of material facts. In fact, the instruction implied that ***any*** affirmative misrepresentation would suffice to find a scheme to defraud.

There was no objection at trial to this aspect of the instruction. On appeal, however, Petitioner and other co-defendants raised this issue for reversal of their convictions, pursuant to this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995). The Fifth Circuit, however, found that there was no plain error, holding that "subsequent to *Gaudin*, this Court has yet to hold that materiality is an element of the mail fraud statute. It is clear to us that the error is not 'plain' under current law, that is, at the time of appellate consideration. As such, the appellants are constrained from showing that mail fraud instruction constituted plain error." *Moser*, 123 F.3d at 827.

Analysis

It is well settled that the Due Process Clause requires "proof beyond a reasonable doubt of ***every*** fact necessary to constitute the crime with which [a defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). More recently, this Court has held that these necessary facts must be found by the jury. *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995).

In this case, the crucial fact of materiality was not properly submitted to the jury for its consideration. Nevertheless, the Fifth Circuit found no plain error, because that court "ha[d] yet to hold that materiality is an element of the mail fraud statute." *Moser*, 123 F.3d at 827.

The Fifth Circuit was plainly wrong in this holding. In examining whether materiality is an element of an offense, it is appropriate to look at the common law roots of the offense. *See, e.g., United States v. Wells*, ___ U.S. ___,

117 S.Ct. 921, 927-28 (1997). And, as a matter of common law, materiality is clearly a *sine qua non* of the offense of fraud. *See, e.g., BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S.Ct. 1589, 1600-01 (1996) ("actionable fraud requires a *material* misrepresentation or omission") (emphasis in original; footnote with citation omitted); *United States v. Carpenter*, 95 F.3d 773, 778 (9th Cir. 1996) (Ferguson, J., dissenting) ("In all fraud cases (civil and criminal) only one kind of misrepresentation matters – a *material* misrepresentation.") (emphasis in original; citations omitted); *United States v. Coffman*, 94 F.3d 330, 335 (7th Cir. 1996) ("Fraud is a *material* misrepresentation or omission. . . . ") (citation omitted). Thus, application of the common law of fraud compels the conclusion that "[s]uch a requirement of materiality should apply to the misrepresentations which form the basis for a mail fraud violation under 18 U.S.C. § 1341. *United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *accord United States v. Von Barta*, 635 F.2d 999, 1006 n.14 (2nd Cir. 1980) (for mail fraud conviction, "any nondisclosures or affirmative misrepresentations must have been material") (citations omitted).

Because "there is a materiality aspect to the determination whether the alleged representations of the accused are fraudulent," *United States v. Daily*, 921 F.2d 994, 1006 (10th Cir. 1990) (citations omitted), "[t]his materiality aspect is appropriately submitted to the jury as one component of the larger factual question as to the existence of fraud and a scheme to defraud." *Id.* (citations omitted); *accord Halbert*, 640 F.2d at 1007-08 (9th Cir. 1981). Indeed, in *Halbert*, the Ninth Circuit held that

district courts are ***required*** to instruct juries on the materiality of alleged misrepresentations under 1341. *Halbert, id.*

As demonstrated by *Daily* and *Halbert*, the rule announced by this Court in *Gaudin* requires that the question of the materiality of any misrepresentations, bearing upon the larger question of fraud *vel non*, be submitted to the jury. Here, the question of materiality was not properly submitted to the jury, and therefore *Gaudin* was violated. Indeed, at least one judge has found *Gaudin* error in the failure of a very similar instruction to properly submit the element of materiality on a mail fraud count. *See Carpenter*, 95 F.3d at 778-80 (Ferguson, J., dissenting). Here, as in *Ferguson*, "the instruction on the definition of materiality was so inadequate that the jury could not have possibly considered the materiality requirement of the crime of mail fraud." *Id.* at 778 (Ferguson, J., dissenting).

The Fifth Circuit's holding in this case is in conflict with the weight of authority holding that the materiality of alleged misrepresentations is an essential fact to be proved in any fraud prosecution. The Fifth Circuit's holding is in direct conflict with the decisions of the Ninth and Tenth Circuits in *Halbert* and *Daily* respectively, which decisions require that the jury be allowed to pass on the question of materiality in a mail fraud statute. Because of the large number of prosecutions under the mail fraud statute and the similarly worded wire fraud statute, 18 U.S.C. § 1343, this Court should grant certiorari to clarify the law regarding the proof necessary for a conviction under these statutes.

II. Where a potentially prejudicial incident occurs during trial, and that incident not only may have been witnessed by one or more jurors but also generated substantial midtrial publicity, the district court should, under this Court's decisions in *Remmer v. United States*, 347 U.S. 227 (1954), *Chandler v. Florida*, 449 U.S. 560 (1981), and their progeny, be required to conduct a complete investigation, including individual voir dire, to determine the extent of any taint.

Facts

The following facts are taken from the district court's written order denying co-defendent Gandy's motion for mistrial: "Midway through the trial [in this case], on [Friday,] December 8, 1995, one of the defendants, Jerry Lynn Wilkins and his wife were stopped coming through the magnetometer on the 16th floor. One of the Court Security Officers observed what he perceived to be a gun in Mrs. Wilkins' purse. As a result, Mr. and Mrs. Wilkins were detained while an investigation was conducted. A .38 caliber revolver loaded with 'Plus-P' hollow-point ammunition was found almost totally concealed from x-ray view by a number of silver dollars. Both Mr. and Mrs. Wilkins were taken into custody. On the morning of this occurrence, the Court and the United States Marshal's Service conducted an investigation regarding the occurrence and attempted to ascertain whether any jurors had observed and understood what was occurring at the magnetometer. At that time the Court believed that no juror observed the incident." As a result of the incident, Wilkins's bond was revoked.

Due to the commotion caused by this incident and the district court's "investigation" into the incident, court began approximately an hour late on the morning of December 8, 1995. When court convened, counsel for Moser urged that the court grant a motion for severance on the basis of these events:

> MR. GORANSON [counsel for Moser]: That's not the purpose of this motion, the severance motion, Your Honor. My understanding certain actions happened outside the courtroom at approximately 9:15. ***A co-defendant or co-defendant's spouse was arrested. Jurors may or may not have been present. I'm not sure. If that's true, then I want a severance.***

(Emphasis added).

Petitioner and Gandy joined in Moser's motion. However, the district court, apparently ignoring the new ground urged by the defense, reiterated its previous promise that it would take up the motion at the conclusion of the evidence.

On Thursday, December 14, 1995, co-defendent Gandy filed a Motion for Mistrial and/or Hearing and Brief on the basis of the arrest of Mr. and Mrs. Wilkins and the attendant publicity. In that motion, Gandy alleged information suggesting that at least one juror had witnessed the incident and requested that the court conduct a hearing in order to inquire into this matter further. Gandy further alleged that there had been a newspaper article about the incident in the December 9, 1995 *Dallas Morning News;* and that there had been television coverage of the incident on Channel 8 in Dallas on December 8, 1995. Gandy also alleged that the district court had been

operating under increased security measures since the incident. In support of that motion, Gandy attached the affidavit of Federal Public Defender investigator Joe Saal, documenting interviews with witnesses to the incident who saw a juror witness the incident.

On the same date – December 14, 1995 – the district court conducted a hearing on the motion for mistrial. At that hearing, Gerald Dollar, Roger Dollar, and Carol Henry testified that they had seen a juror witness the Wilkinses' arrest. Attorney Tom McCorkle (the trial attorney for O'Neill) stated that "[s]everal jurors were witnessing this because I passed by them coming to and from the restroom. The commotion with the security guards was there in the presence of at least three jurors."[2]

At the end of this hearing, the district court concluded that, as soon as the juror mentioned by the Dollars and Henry could be identified, that juror would be dismissed. The next day, after determining that the juror was Linda Mitchell, the court excused Mitchell from the jury. The district court did not question Mitchell about what she had seen, or whether she had communicated it to, or discussed it with, any other member of the jury. Nor did the district court question any other members of the jury.

On December 26, 1995, Gandy filed a Motion for Leave to Contact Jurors and Brief, asking permission to

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[2] McCorkle was subsequently placed under oath, following which he testified that his previous statements were true and expanded upon what he had said before.

interview the jurors about the Wilkins incident and attendant publicity. Gandy alleged that "[u]nder the circumstances of this case, the Court should have taken further steps to determine whether the excused juror told other jurors about the arrest of Mr. and Mrs. Wilkins. Furthermore, there is evidence of record to suggest that at least one other juror [besides Linda Mitchell] may have been in the area of the 16th floor at the time that Mr. and Mrs. Wilkins were arrested." Gandy augmented this motion with a Reply filed on January 5, 1996, which reply contained an affidavit from the Federal Public Defender investigator Joe Saal and copies of newspaper articles (*see* Appendix F), and transcripts of the television news broadcasts (*see* Appendix E), dealing with the Wilkins incident.

On January 30, 1996, Gandy filed a Second Motion for Mistrial and Brief, realleging all of the above and including an actual videotape of the referenced television news broadcasts.

On April 18, 1996, the district court issued a Memorandum Opinion and Order denying the motions for mistrial and motion for leave to contact jurors.

On appeal, the defendents challenged the district court's failure to investigate whether other members of the jury (besides the excused juror Mitchell) had either witnessed the Wilkins gun incident, discussed it with Mitchell, or seen any of the broadcast or print media publicity concerning the incident. However, the Fifth Circuit found that "[t]he appellants' assertion that another juror might have witnessed the incident is pure conjecture," and thus held that "the district court did not abuse

its discretion in its handling of the allegation of outside influence on the jury." *Moser*, 123 at 827. The Fifth Circuit did not address the question of the midtrial publicity about the Wilkins gun incident, except to note parenthetically that "the court instructed the jury throughout the trial not to partake of any media coverage of the trial." *Id.* at 827 n.13.

Analysis

It is now axiomatic that, at least in a federal prosecution, where there is the possibility of an extrinsic influence on a juror, the trial court "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer v. United States*, 347 U.S. 222, 230 (1954). Moreover, in the special case of possible prejudice resulting from midtrial publicity, "the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast – compromised the ability of the particular jury that heard the case to adjudicate fairly." *Chandler v. Florida*, 449 U.S. 560, 575 (1981). *See also Smith v. Phillips*, 455 U.S. 209, 215-18 (discussing importance of full evidentiary hearing in this context).

The procedure implemented in this case did not address the concerns raised in *Remmer*, *Chandler*, and *Smith v. Phillips*, and was not sufficient to safeguard Petitioner's right to a fair trial. As the Fifth Circuit has itself noted (in other cases) where a colorable showing of prejudicial extrinsic jury influence appears, "a court must

investigate the asserted impropriety." *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979); *see also United States v. Sanchez-Sotelo*, 8 F.3d 202, 212-13 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1410 (1994). This evidentiary inquiry "must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room. ***Having determined the precise quality of the jury breach,*** if any, the district court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant." *Winkle*, 587 F.2d at 714 (emphasis supplied), *quoting United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975); *see also Sanchez-Sotelo, id.*

In the instant case, the district court failed to adequately investigate the alleged jury breach as required by the case law of both this Court and the Fifth Circuit. Although the district court did excuse juror Mitchell after determining (from other persons besides Mitchell herself) that Mitchell had likely witnessed the Wilkins incident, this was at best a half-measure inadequate to discharge the court's duty to investigate. The district court did not interview Mitchell to confirm that she had actually witnessed the Wilkins incident and, if so, whether she had communicated what she had seen to other jurors. Nor did the district court interview the other jurors to determine whether they had witnessed the incident or whether they had heard about the incident from Mitchell or someone else – ***despite testimony from attorney McCorkle that "several" jurors witnessed the commotion by the 16th floor magnetometer.***

In this case, in the face of clear evidence that one or more jurors witnessed a very startling incident, the district court neither questioned the one juror (Linda Mitchell) it definitively found to have witnessed the incident; nor did it question other jurors to determine whether they witnessed the incident or whether juror Mitchell had communicated to them anything about the incident in the week between Mitchell's witnessing it and her being excused from the jury (December 8 to December 15, 1995). Here, given the district court's failure to question Mitchell or the other members of the jury, it is impossible to know whether other members of the jury were privy to the Wilkins incident, either by directly witnessing that incident or by hearing about it from Mitchell or someone else.

The need for inquiry was all the more pressing in light of the inflammatory publicity generated by the Wilkins incident. The incident was extensively covered by Channel 8, the local ABC affiliate, on the 6:00 and 10:00 news broadcasts, with film footage of Mr. and Mrs. Wilkins and interviews with trial prosecutor Tom Hamilton and United States Attorney Paul Coggins. *See* Appendix E (transcripts of news broadcasts). The television coverage emphasized that Wilkins was in the midst of a grueling cross-examination by the prosecutor, and suggested the possibility of some vengeful motive on the part of Mrs. Wilkins. Moreover, United States Attorney Coggins stated that he had been in touch with Attorney General Janet Reno about the situation and that she was "concerned." Coggins expressed the desire to obtain more security for the federal court building.

Likewise, the *Dallas Morning News* – the sole daily paper in Dallas – ran an article about the incident on Page One of its Metropolitan section on Saturday, December 9, 1995.[3] *See* Appendix F. In this article, a prosecutor was quoted as saying that the United States Attorney's Office did not believe Mrs. Wilkins's bringing the gun was inadvertent. An agent of Federal Protective Services was quoted to the effect that the gun in question was loaded with five hollow-point rounds that would cause "extreme damage to the body on impact" and that Mrs. Wilkins had referred to Judge Kendall – the United States District Judge presiding over this case – as "the enemy." The story repeated United States Attorney Coggins's comment that the incident showed the need for more security in the federal courthouse, and concluded by mentioning two recent incidents in the Dallas/Fort Worth area where persons had smuggled guns into courthouses and shot and killed persons within the courthouse.

Here, the very limited investigation/inquiry undertaken by the district court – in which it did not question ***any*** of the jurors – was inadequate to ferret out jury exposure to the very prejudicial Wilkins incident, or publicity stemming therefrom, as required by this Court's decisions in *Remmer, Chandler,* and *Smith v. Phillips.* Thus, in allowing Petitioner's convictions to stand despite the lack of a full airing of the impact on the jury that decided this case, the Fifth Circuit "has decided an important

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[3] There were also article in the *Waxahachie Daily Light,* a daily newspaper for the town of Waxahachie, in Ellis County, a county bordering Dallas County from which jurors for the Dallas Division of the Northern District of Texas are drawn.

federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Moreover, the Fifth Circuit's decision in this case is in tension with decisions from other federal circuits requiring a more searching investigation of the possible jury taint. *Cf. United States v. Hall*, 85 F.3d 367, 369-70 (8th Cir. 1996) (remanding for evidentiary hearing where district court "fail[ed] to explore the nature of the jury's exposure to extraneous, prejudicial information beyond what the single affidavit [from jury foreman] recount[ed]"; collecting similar cases); *United States v. Angulo*, 4 F.3d 843, 847-48 (9th Cir. 1993) (remanding for evidentiary hearing where district court failed to question remaining jurors regarding their knowledge of a threatening phone call to a juror who was excused therefor). Additionally, now, more than ever before, it is important that this Court speak to the proper procedure to be followed where incidents like this occur. Accordingly, this Court should grant certiorari to decide this question.

III. The Fifth Circuit erred in finding that the district court did not reversibly err in failing to sever Petitioner's case for separate trial.

Facts

Prior to trial, Petitioner filed a timely motion for severance, asking that he receive a separate trial from the other defendants. The district court, however, denied that motion. During trial, Petitioner continued to reurge his motion for severance and his objections to a joint trial. These renewed motions for severance were also denied.

On appeal, the Fifth Circuit found no error in the district court's failure to sever Petitioner's case for prejudicial joinder under Federal Rule of Criminal Procedure 14, holding that the defendants' defenses were not so antagonistic as to deny Petitioner a fair trial. *Moser* at 828-29.

B. Analysis

This case demonstrates the need for this Court to set some limits on the government's penchant for combining defendants with only a very tenuous connection to each other into a single, confusing mega-prosecution.

Even where misjoinder is not established under Rule 8, severance may still be warranted under Federal Rule of Criminal Procedure 14 "[i]f it appears that a defendant . . . is prejudiced by a joinder . . . of defendants in an indictment or information or by such joinder for trial together. . . . " Fed. R. Crim. P. 14. In the instant case, Petitioner was so prejudiced by events at the joint trial as to require reversal of his convictions.

Petitioner's joint trial with Wilkins, O'Neill, Johnston, Gandy, and Moser prejudiced him in several critical ways. First and foremost, as discussed above, the indictment incorrectly charged a single conspiracy, when, in fact, there were at least two: the L.A. Pethahiah operation and the O.M.B.-W.D. McCall conspiracy. The evidence at trial made even clearer the proposition that these were two conspiracies, not one. Under such circumstances, the Eleventh Circuit has held that a lesser showing of prejudice should be required than in the normal Rule 14 case: "[i]f the defendants ought not to have been jointly

indicted, clearly no principle holds that they should have been jointly tried; the concern we normally would have for judicial economy is not nearly as strong when we see that [the defendant] was entitled to a separate trial in the first place." *United States v. Fernandez*, 892 F.2d 976, 990 (11th Cir. 1989), *cert. denied*, 495 U.S. 944 (1990).

The joinder of Petitioner with the other defendants for trial resulted in Petitioner's jury being exposed to an enormous amount of very prejudicial evidence which would not have been admissible against Petitioner, had he been tried separately. First, the jury was exposed to very prejudicial evidence pertaining to the L.A. Pethahiah operation. The jury was told that L.A. Pethahiah alone was responsible for injecting over $63 million of worthless CMOs into the economy.

But the Pethahiah evidence was not the only prejudice to Petitioner. In fact, the evidence showed that there was not even a single conspiracy as to all of the O.M.B.-W.D. McCall defendants. Rather, the evidence showed that Petitioner was, as the district court in this case put it, merely an "end user" of McCall CMOs – like some 300 other persons who, unlike Petitioner, were not prosecuted – who was unaware of the scope and hierarchy of the McCall Waxahachie operation (and did not even know his other defendants in this case) and who was unaware of the identity of other "end users" from around the country.

Unfortunately, by dint of being erroneously joined in the putative "conspiracy," Petitioner's jury heard extremely inflammatory evidence pertaining to the use of

CMOs by one Allan Kramer. Mark Howard Fetzer testified that Kramer used a bogus McCall CMO to purchase Fetzer's house. Kramer then rented the house out to others, while Fetzer was left on the hook for the mortgage when the mortgage company rejected the bogus CMO as payment. Fetzer had to retain an attorney to recover his house, and even then it took several months and some $5,800 before Fetzer recovered his house. Fetzer testified that he had never met or heard anything about Petitioner.

Likewise, Joni Knowles testified that Kramer used a bogus McCall CMO to purchase her house. Again, as with Fetzer, by the time Knowles learned of the scam Kramer had pulled, Kramer had already rented out Knowles's house to other persons, this time with a lease-to-buy option. Knowles remained responsible for paying the note on the house, however. Unfortunately for Knowles, however, the fiasco with Kramer resulted in foreclosure on her house and the ruining of Knowles's credit. Knowles also let it slip that Kramer had been "locked up," telling the jury that at least one user of CMOs had been incarcerated for his actions. However, Knowles testified that she had never met Petitioner before.

The Kramer evidence given by Fetzer and Knowles supplied the ***only*** evidence in which CMOs had been used to buy things of substance from real, live individuals, as opposed to merely extinguishing antecedent debt with financial institutions. The trials and tribulations of real persons Fetzer and Knowles – particularly the hard luck story of Ms. Knowles – were far more heartwrenching, emotional, and inflammatory than the evidence of use of CMOs to extinguish antecedent debt with a financial institution (the only type of use of CMOs alleged as

to Petitioner). This extremely prejudicial evidence would not have come in at a trial of Petitioner alone.

The jury heard prejudicial evidence of the use of common-law liens by Johnston. However, again, Petitioner had nothing to do with any of this.

Finally, Petitioner was prejudiced by the bizarre defense mounted by Johnston, Wilkins, and O'Neill: these defendants persisted in arguing that banks were illegally loaning their credit, and that, therefore, the tendering of worthless CMOs and CBCs to extinguish the debt created by that illegal loan of credit did not constitute a crime. These defendants admitted on the record that this was their position; while Gandy and Petitioner explicitly disavowed that position. Despite Petitioner's attempts to distance himself from this wild-eyed defense, the jury could not avoid being distracted and confused by the cross-examination, evidence (including "expert" testimony), and argument directed toward that legal position.

Because the jury had much "more before it than the evidence that [was] relevant to [Petitioner]," *Fernandez*, 892 F.2d at 990, the prejudice to Petitioner required severance. *See id.* at 990-91. Additionally, it must be considered that this was a paper-intensive trial, which lasted 21 days from start to finish (November 28, 1995 through December 18, 1995), with six defendants charged in seventeen counts, and hundreds of pages of exhibits. *Cf. Diaz-Muñoz*, 632 F.2d at 1337 (facts that "trial lasted more than two weeks and involved three defendants, nineteen counts, and over two-hundred exhibits" militated in favor of finding prejudice from district court's failure to sever).

Under these circumstances, Petitioner suffered compelling prejudice from the failure to grant relief from prejudicial misjoinder pursuant to Rule 14. The Court of Appeals erred in finding that there was no reversible error in failing to sever Petitioner's case for separate trial.

Additionally, this case provides a useful vehicle for this Court to reiterate the principles it set forth half a century ago in *Kotteakos;* and it provides this Court with an opportunity to amplify upon the subject of discretionary severance which it last addressed in *Zafiro v. United States,* 506 U.S. 534 (1993). Accordingly, this Court should grant certiorari to consider this question as well.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10464

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVEN P. MOSER; LAVOYD WAYNE DOLLAR; FRANKLIN ROLLIN JOHNSTON; BILLY MACK O'NEILL; JERRY LYNN WILKINS; THOMAS D. GANDY,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

(Filed Sep. 18, 1997)

Before GARWOOD, BENAVIDES, and STEWART, Circuit Judges.

BENAVIDES, Circuit Judge:

This direct criminal appeal involves six appellants who challenge, among other things, the sufficiency of the evidence to support their convictions, the jury instructions, the legality of the search, and the district court's denial of their motion to sever the trial. Finding no error, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In February of 1986, Appellant Franklin Rollin Johnston (Johnston) was engaged in the real estate business and suffered severe financial losses. Johnston attributed those losses on the downturn of the real estate market, oil business, and ultimately, the failure of the banks. After attending various seminars and conducting research, he became convinced that the Federal Reserve Act was illegal inasmuch as banks were creating money out of thin air and lending only their "credit."

After having met Appellant Billy Mack O'Neill (O'Neill) in March of 1993, Johnston happened to meet O'Neill at a meeting involving the subjects of banking and money in May of 1993. O'Neill gave Johnston a packet of materials generated by the "Family Farm Preservation" entity of Tigerton, Wisconsin. The packet contained several court cases, blank "certified money orders" (CMOs), and articles explaining that banks legally cannot loan credit. The CMOs provided that they were payable:

> on demand, money of account of the United States, as required by law in Sect. 20 of Coinage Act of 1792 from the time of official determination of the substance of said money: or, in U.C.C. 1-201(24) Credit Money.

The money order further provided that it was redeemable at full face value when presented to L.A. Pethahiah in Tigerton, Wisconsin. If a financial institution presented the money order to Pethahiah, the institution would then receive a certified banker's check (CBC) in the same

amount as the CMO. The CBC also contained the above limiting language.

Johnston gave the packet of materials to Appellant Jerry Lynn Wilkins (Wilkins), an attorney who Johnston had previously retained to do some work. Wilkins examined the materials and then advised Johnston, who in turn advised O'Neill, that he agreed with the information in the packet.

Johnston then formed USA First, an unincorporated business organization in Waxahachie, Texas. Appellant Lavoyd Wayne Dollar (Dollar), a businessman and long time friend of Johnston, owned office space in Waxahachie and rented a suite of offices to Johnston for USA First. O'Neill worked for USA First, and Wilkins moved his law office to the offices of USA First. Johnston paid Wilkins $500 each week for the work he did for USA First. Each of those four men used CMOs from the Tigerton packet in an attempt to pay off debts with various lenders.

Shortly thereafter, Johnston put together a packet almost identical to the Wisconsin packet and began to sell it out of the offices of USA First for $300. The packet instructed that the user could fill out the six enclosed CMOs in any amount to pay off particular debts. Like the Wisconsin CMOs, these CMOs contained the above-quoted limiting language. The packet instructed the user to include 2-3 months extra interest and to ask for return of any overpayment. The institution to which a CMO was sent by certified mail was instructed to forward the CMO for redemption to O.M.B.-W.D. McCall at a post office box

in Waxahachie.[1] The institution would then receive in return an item entitled "certified banker's check" (CBC) in the same amount as the CMO. The CBC would be signed by O'Neill. The institution was instructed to credit the CBC to the debtor's account. When the CBC was returned to USA First, O'Neill would stamp it "paid in full." There was no money behind the CMOs or CBCs. The packet itself referred to the CMOs as "pretend money."

The Texas Department of Banking sent a cease and desist letter to O.M.B.-W.D. McCall, admonishing that it had information that the business was violating state law regarding the unlicensed sale of payment instruments. The letter explained that such a violation was a third degree felony. The warning in the letter was ignored, and USA First continued to sell the packets containing the CMOs.[2]

In December of 1993, the offices of USA First were searched and records were seized. Shortly thereafter, Leo Hoad (Hoad) began working for USA First. Apparently, O'Neill and Hoad had some differences, and as a result, O'Neill left USA First.

Meanwhile, Appellant Steven P. Moser (Moser), who owned several pieces of mortgaged real property in Pennsylvania, was experiencing financial difficulties and,

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[1] The "O.M.B." designation was Billy Mack O'Neill's initials reversed. The post office box was controlled by USA First.

[2] In fact, the cease and desist letter was placed on the bulletin board at USA First as an object of disdain.

through a friend, heard of USA First in Texas. Moser subsequently talked with Johnston and purchased a packet. He used several of the CMOs in an effort to discharge his debt.

Appellant Thomas D. Gandy (Gandy) learned of USA First through a trust company employee in Kansas. Gandy purchased a packet, and used the CMOs as payments for existing loans. All six appellants attempted to use the CMOs. Ultimately, over 800 CMOs were issued by O.M.B.-W.D. McCall with a purported face value of over $61 million.

A grand jury charged the six appellants with one count of conspiracy to commit mail fraud and several substantive counts of mail fraud in violation of 18 U.S.C. §§ 371, 1341, and 2. The jury found Wilkins, Johnston, Dollar, and O'Neill guilty as charged. The jury acquitted both Moser and Gandy of conspiracy but found Moser guilty of one substantive count of mail fraud and found Gandy guilty of two substantive counts of mail fraud.

The district court sentenced the appellants as follows: Johnston and Wilkins, 96 months; Dollar and Moser, 21 months; O'Neill, 70 months; Gandy, 4 months and 16 days.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

All the appellants argue that the evidence is insufficient to sustain their convictions.[3] Johnston, Wilkins, and

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[3] O'Neill attempts to adopt by reference Gandy's arguments that the evidence is insufficient to sustain his

Dollar were convicted of one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 and substantive counts of mail fraud in violation of 18 U.S.C. § 1341 (Johnston, two counts; Wilkins, seven counts; and Dollar, five counts). Gandy and Moser were acquitted of the conspiracy count but convicted of mail fraud (Gandy, two counts; Moser, one count).

When reviewing the sufficiency of the evidence, this Court views all evidence, whether circumstantial or direct, in the light most favorable to the Government with all reasonable inferences to be made in support of the jury's verdict. *United States v. Salazar*, 958 F.2d 1285, 1290-91 (5th Cir.), *cert. denied*, 506 U.S. 863, 113 S.Ct. 185 (1992). The evidence is sufficient to support a conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* The evidence need not exclude every reasonable hypothesis of innocence or be completely inconsistent with every conclusion except guilt, so long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir.), *cert. denied*, 513 U.S. 870, 115 S.Ct. 193 (1994).

To prove a violation of the mail fraud statute, 18 U.S.C. § 1341, the Government must prove beyond a reasonable doubt that there was (1) a scheme or artifice to defraud, (2) specific intent to commit fraud, and (3) use of the mails for the purpose of executing the scheme to

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convictions. Because these are fact-specific challenges, O'Neill will not be permitted to adopt these arguments by reference. *United States v. Alix*, 86 F.3d 429, 434 n.2 (5th Cir. 1996).

defraud. *United States v. Shively*, 927 F.2d 804, 813-14 (5th Cir.), *cert. denied*, 501 U.S. 1209, 111 S.Ct. 2806 (1991). "Intent to defraud requires an intent to (1) deceive, and (2) cause some harm to result from the deceit." *Jimenez*, 77 F.3d at 97 (citation omitted). A defendant has the intent to defraud if he acts knowingly with the specific intent to deceive for the purpose of causing pecuniary "loss to another or bringing about some financial gain to himself." *Id.*

A conviction for conspiracy under 18 U.S.C. § 371 requires the Government to prove beyond a reasonable doubt (1) an agreement between two or more persons, (2) to commit a crime against the United States, and (3) an overt act in furtherance of the agreement committed by one of the conspirators. *United States v. Krenning*, 93 F.3d 1257, 1262 (5th Cir. 1996).

1. Johnston

Johnston argues that his offer of payment in kind is an accepted banking practice and that the CMO and the CBC "could be valid if they had been accepted by the financial institution." He contends that if the bank had accepted the offer of payment he would not have been guilty of mail fraud. He then reasons that as a matter of law he cannot be guilty of conspiracy to commit mail fraud and mail fraud simply because the bank decided not to accept his offer of payment. This argument is specious. The evidence at trial clearly established that the CMOs and CBCs underlying his convictions are worthless. His convictions do not rest on the bank's decision to reject his offer of payment because that is not an element

of the offenses. He does not otherwise challenge the sufficiency of the evidence to support his convictions. This argument is without merit.

2. Dollar

Dollar challenges the evidence to support his convictions for conspiracy and mail fraud, arguing that the Government failed to prove that he had the intent to defraud. He contends that the principals of USA First did not inform the users of the packet that they were engaging in a fraudulent act and that it was not manifest from the packet itself. He concedes that the materials advised the user not to tell the bank that he was using pretend money just like the banks were using pretend money,[4] but he nonetheless asserts that this statement in itself does not reveal that the use of the CMOs was fraudulent. He further asserts that the "statement was in accord with USA First's theory that banks were unlawfully lending their credit; therefore, their debtors could respond *in kind*." (emphasis added). Dollar's argument proves too much. In other words, if the debtor is responding *in kind* to the bank's illegal conduct, the packet is at least implicitly stating that the debtor's conduct also is illegal.

In any event, viewing the evidence in the light most favorable to the verdict, the evidence is sufficient to show

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[4] The packet advised the user that "just like in the children's story about the Emperor's new clothes, do not mention that your current credit money, the negotiable instrument, is pretend money, only speak of the bank's negotiable instruments as being pretend money or only promises while yours are according to U.C.C. law."

the requisite intent. In addition to the statement regarding the "pretend money," the jury could infer knowledge from the fact that Dollar paid $300 for a packet of materials that included money orders that could be filled out for any amount of money. Moreover, Dollar ignores that, after his CMOs were rejected, he filed a $49 million lien against a bank's employee.[5] Finally, although Dollar testified that he had no intent to defraud, the jury obviously found his testimony incredible. The evidence is sufficient to support Dollar's convictions.

3. Gandy

Gandy challenges both the sufficiency of the evidence to show (1) that he had specific intent to defraud and (2) that the mailing was in furtherance of the scheme to defraud. In regard to his first challenge, Gandy states that his defense at trial was that he himself was a victim of the scam perpetrated by USA First and that he never intended to defraud anyone. Specifically, Gandy asserts that he believed in good faith that he was simply refinancing his home at a lower interest rate through W.D. McCall.

At trial, Gandy called Jay Newland, who worked for Continental Trust Company in Wichita, as a witness. Newland testified that he had informed Gandy that USA First was providing low interest loans and sent off for a packet that Gandy ultimately purchased. Gandy believed

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[5] Dollar testified that the $49 million figure was "[j]ust a number that we came up with." It was "just a figure that I pulled out of the air."

the CMOs could work because a mutual acquaintance, Lonnie Canon, had used the CMOs to successfully discharge a debt.

Gandy further asserts that the evidence shows that even when he experienced problems with the CMOs, he still believed he could obtain refinancing through USA First. He attributes this belief to the representations of Hoad, who led Gandy, among others, to believe that W.D. McCall was going to establish its own bank in Panama. As late as April of 1994, Hoad sent a letter to Gandy indicating that he had been preliminarily approved for a loan of up to $200,000. Hoad kept asserting that refinancing was right around the corner. Gandy also relies on the fact that he paid off all his loans prior to the prosecution of this case.

The Government responds that Gandy knowingly used the CMOs to erase a debt that had bought him a valuable asset and then insisted that the lender was obligated to accept the bogus payment, accusing the lender of criminal fraud and threatening "non judicial remedies through the Uniform Commercial Code" against the institution's lawyer personally. The jury certainly could have found that this evidence contradicted Gandy's defense of good faith and supported a finding of his intent to defraud.

Further, as discussed above, the packet[6] contained language referring to the CMOs as "pretend money" and warned the user not to refer to the CMOs as pretend money. Additionally, the record reveals that in December

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[6] Gandy's exhibit 1A.

of 1993, after learning there was a problem with the CMO he submitted to Union National Bank, Gandy represented to a loan officer that "he had used [W.D. McCall] several times in the past [and] had not had any problems with them . . . and that he had paid good money for [those] checks. . . . " Contrary to Gandy's representation, the evidence at trial demonstrated that Gandy had indeed been put on notice in November of 1993 that a CMO he submitted to Mulvane State Bank was not being accepted as payment. Thus, viewed in the light most favorable to the verdict, the evidence demonstrates that Gandy had the specific intent to defraud.

Gandy next argues that there is insufficient evidence to establish that the mailings were used for the purpose of executing the scheme to defraud because the mailings alleged in counts 15 and 16 occurred after the alleged scheme had come to fruition, which he defines as occurring when the loan was deemed paid in full.

On November 12, 1993, Gandy submitted a CMO for $66,750 to Wichita Federal Savings & Loan. On November 15, 1993, Wichita Federal Savings & Loan released Gandy from any obligation on his loans and notified him they were paid in full. Count 15 alleged that on December 6, 1993, a CBC in the amount of $66,750 was mailed by W.D. McCall to Wichita Federal Savings & Loan. Count 16 alleged that on January 11, 1994, a letter was mailed to Wichita Federal Savings in connection with the scheme.

We reject Gandy's premise that the scheme came to fruition when the savings & loan initially notified him that his loan was paid in full on November 15, 1993. As the evidence at trial made abundantly clear, that was not

the end of Gandy's efforts to make the scheme succeed. Although the receipt of the bogus CMO by the savings & loan caused it to send the release of the loan, the subsequent mailings of the CBC and the letter were "incident to an essential part of the scheme." *Schmuck v. United States,* 489 U.S. 705, 109 S.Ct. 1443, 1448 (1989). We therefore conclude that the evidence was sufficient to support the substantive counts of mail fraud.

4. Moser

Moser argues that the letter that underlies his sole conviction for mail fraud does not further the alleged scheme to defraud. The letter was from O'Neill to Wayne Paul (Paul), an officer of Woodlands Bank. Paul testified that Moser had five loans at Woodlands Bank. In November 1993, Moser was behind in making payments, and the bank received a mailing from Moser with a letter stating that the enclosed CMO constituted:

> payment in full, on demand of the United States, as required by law at USC 371, from the time of official determination, as required by law at USC 371, from the time of official determination of the substance of said money, or in U.C.C. 1-202(24) credit money. . . . This certified money order is with a Private concern and must be mailed to O.M.B. W.D. McCall, P.O. Box 954, Waxahachie, Texas 75165.

Paul testified that the money order looked suspicious and that he did not understand the letter. The bank then sent the CMO to the Waxahachie address, enclosing a letter questioning the validity of the CMO.

In response, O'Neill sent the letter that is the mailing that is alleged in count 14. That letter provided in part that:

> I truly can understand your concern – especially when your own regulatory laws require you to act within 24 hours or "before midnight" and seventy-two hours then changing from default to unlawful conversion. Also, the fact that millions of people have learned about the fraud perpetrated by the Federal Reserve System (a private corporation) through you and your "bank." Primarily, they are angry that you made "loans of credit" with no lawful consideration from you from the beginning.
>
> You created-from-thin-air-credit-loan of bad-check-loan of credit was bad enough, but you socked it to them with Usury when you had nothing of intrinsic value to charge interest on. **wow! what a deal!**
>
> You will find enclosed a Certified Bankers Check in the amount of $227,400.00 and your accommodating signature will suffice to cancel the Certified Money Order now in your possession. You shall credit your customer, Steve Moser, with this amount and give him clear title to whatever you have a lien against that he is tendering payment on.

Moser argues that the tenor and language of the letter does not attempt to lull the victim into a false sense of security. He contends that "[t]he letter did not help the plan *succeed;* instead it created a risk of exposing the alleged scheme." (emphasis in brief). Moser makes much of the fact that Paul testified that he was not "impressed" with the letter. We have rejected a similar claim. In *United*

States v. Shively, this Court explained that the failure of the letter to in fact lull the institution does not relieve a defendant of criminal liability. 927 F.2d at 815. Additionally, we stated that viewed in the light most favorable to the verdict, a reasonable juror could have concluded that the letter was intended to lull the bank. Any delay as a result of the letter would allow the scheme to continue. *Id.*

Likewise, in the instant case, any delay caused in foreclosure proceedings, or the like, would allow the scheme to continue. Moreover, although we understand Moser's argument, it would be absurd to conclude that the letter, which expressly directs the bank to credit Moser's account, was not sent for the purpose of executing the scheme.

Moser further asserts that the letter could not have aided in the execution of the scheme in that it was more likely to cause detection and deter any use of the CMO or CBC. The Supreme Court has rejected this view, holding that "[t]he relevant question at all times is whether the mailing is part of the execution of the scheme to defraud as conceived by the perpetrator at the time, regardless of whether the mailings later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Schmuck v. United States*, 489 U.S. 705, 109 S.Ct. 1443, 1449-50 (1989).

Moser next asserts that there is no evidence that he was aware of the letter sent by O'Neill until he received a copy of the government's exhibits in September of 1995. "This court has held that when an individual does an act with the knowledge that the use of the mails will follow

in the ordinary course of business, or when such use can *reasonably be foreseen, even though not actually intended,* then he/she causes the mails to be used." *Shively,* 927 F.2d at 815 (internal quotation marks omitted) (emphasis in opinion). Here, it was reasonably foreseeable to Moser when he sent the CMO that the use of the mails would follow in the ordinary course of business at USA First. Moser's claim of insufficient evidence is without merit.

5. Wilkins

Wilkins continues to argue that the CMOs were not fraudulent instruments because it was credit for credit. The evidence clearly demonstrated that the CMOs submitted were worthless and that the users submitted those CMOs in an attempt to discharge real debts and keep valuable assets. Wilkins also argues that the evidence shows that he was simply a legal advisor. Wilkins ignores the evidence that he used a CMO in the amount of $137,700 in an attempt to pay off his home mortgage. Wilkins is not entitled to relief on this claim.

B. MOTION TO SUPPRESS

This Court reviews *de novo* the determination whether a search or seizure was reasonable under the Fourth Amendment. *United States v. Seals,* 987 F.2d 1102, 1106 (5th Cir.), *cert. denied,* 510 U.S. 853, 114 S.Ct. 155 (1993). The evidence must be reviewed most favorably to the prevailing party. *United States v. Shabazz,* 993 F.2d 431, 434 (5th Cir. 1993).

Johnston and Wilkins argue that the district court erred in failing to suppress the evidence seized from the business premises of USA First because the search warrant was a "general warrant," which gave the agents discretion to determine which items were to be seized. "A warrant must particularly describe the place to be searched and the person or things to be seized." *United States v. Kimbrough*, 69 F.3d 723, 727 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1547 (1996). To determine whether the description of the items to be seized is sufficient, "a court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized." *Id.*

In the present case, the items to be seized were described in exhibit B, which was attached to the search warrant:

> Records relating to the production, advertising, ordering, sale, mailing and shipment of material involved in the use of "Certified Money Orders" by U.S.A. First and O.M.B., W.D. McCall. Such records, files and promotional material include but are not limited to promotional material advertising the money orders, printed material sold to those responding to the offer, listing of individuals purchasing the material, records concerning the receipt of payment and shipment of orders, financial records including but not limited to all original canceled checks, and other items such as printing and reproduction equipment, all concerning the operation of U.S.A. First, which is property constituting evidence of the commission of a criminal offense; the fruits of the crimes; and property designated and intended for use and which is and has been

> used as a means of committing an offense concerning a violation of Title 18, United States Code, Section 1341.

Contrary to the appellants' contentions, the search warrant meets the particularity requirement. The above language sufficiently limited the agents' discretion by instructing them what items were to be seized. *Kimbrough*, 69 F.3d at 727.[7]

Wilkins next claims that the search was unreasonable because the agents executing the warrant violated the "knock and announce" rule contained in the Fourth Amendment and 18 U.S.C. § 3109.[8] "Under both the Fourth Amendment and the 'knock and announce' statute, defendants bear the initial burden of establishing that an unannounced entry actually occurred." *United*

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[7] Johnston asserts that the affidavit was not attached to the warrant during the search and that the warrant did not expressly reference the affidavit. *See United States v. Layne*, 43 F.3d 127, 132 (5th Cir.) (recognizing that the test for particularity may be satisfied with supporting affidavits if warrant refers to affidavits), *cert. denied*, 514 U.S. 1077, 115 S.Ct. 1722 (1995). The warrant does, however, refer to the affidavit as establishing probable cause. More importantly, exhibit B (not the affidavit) was the document that limited the agents' discretion by describing with sufficient particularity the types of items to be seized, and exhibit B was attached to (and expressly referenced by) the search warrant.

[8] Section 3109 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

States v. Fike, 82 F.3d 1315, 1323 (5th Cir.), *cert. denied*, 117 S.Ct. 241 (1996). Wilkins acknowledges that this claim was not raised in the district court. Wilkins cannot show plain error in regard to this obviously fact-based claim. *See United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994), *cert. denied*, 513 U.S. 1196, 115 S.Ct. 1266 (1995); *United States v. McCaskey*, 9 F.3d 368, 376 (5th Cir. 1993), *cert. denied*, 511 U.S. 1042, 114 S.Ct. 1565 (1994).

C. ADMISSION OF EVIDENCE

This Court reviews the admission of evidence for abuse of discretion. *United States v. Coleman*, 997 F.2d 1101, 1104 (5th Cir. 1993), *cert. denied*, 510 U.S. 1062, 114 S.Ct. 735 (1994). Moser and Gandy argue that the district court erred in admitting evidence that Allan Kramer (Kramer), an unindicted coconspirator, used an O.M.B.-W.D. McCall CMO to purchase a residence from Mark Fetzer. They argue that the evidence was irrelevant and prejudicial. This conduct was alleged in the indictment as an overt act under the heading of "Thomas Gandy." At trial, the Government stated that this act should not have been under Gandy's name in the indictment.

The witness who related this evidence testified on cross-examination that he did not know either Moser or Gandy. Additionally, at trial, the Government conceded that it had no evidence that Kramer knew Gandy, Moser, or Dollar.

Both Moser and Gandy were charged with conspiracy to commit mail fraud. It appears that the only way this evidence was relevant to Moser or Gandy was to the extent that it was evidence of the conspiracy. Assuming

arguendo that the evidence was not relevant, Moser and Gandy cannot show prejudice because both were acquitted of the conspiracy count.

Moser and Gandy also argue that the district court erred in allowing Donelle Smith to testify regarding a CBC (Government's exhibit 28) that Ted Schalesky used to pay off a note in the amount of $232,234.62. Smith's testimony was introduced in connection with count 17 of the indictment, which charged O'Neill with a substantive count of mail fraud.

The Government argues that there was no objection to Smith's testimony and thus this claim should be reviewed for plain error. Moser correctly asserts that previously, in connection with another witness's testimony, an objection was made that the Government's Exhibit 28 "was not relevant to the case being tried." That objection was overruled and the exhibit was admitted into evidence. However, as the Government states, there was no such objection to Smith's testimony. Even assuming for purposes of this appeal that the earlier objection preserved this claim, Moser and Gandy cannot establish error, much less harmful error, in that Smith's testimony was introduced in support of count 17, a count that charged O'Neill, not Moser or Gandy.

Moser next argues that the district court erred in admitting three documents that were used by the Government to impeach him during his cross examination. Moser describes the documents as "common law court pleading[s] seeking to keep Woodlands [Bank] from foreclosing on the collateral that the bank had on the loans that were the subject matter of the criminal litigation."

Moser contends that the evidence and cross examination regarding "these extrinsic offenses had little probative value on the charges in the indictment and the probative value was substantially outweighed by the danger of unfair prejudice." Moser's contention that these documents are evidence of extrinsic offenses is puzzling. These documents were relevant in that Moser's loan from Woodlands Bank was the subject of count 14 (which charged Moser with a substantive count of mail fraud), and Moser's loan from Williamsport National Bank is listed as an overt act in the indictment.

Moser repeatedly testified on direct examination that he used the CMOs believing that he would in turn owe USA First the money it sent in the form of a CBC to his other creditors. The jury could have inferred from these exhibits that Moser did not intend to pay his debts but instead sought to stop the bank's litigation by invoking the jurisdiction of a bogus court. Additionally, the district court found that packets used by USA First contained information similar to statements made in the Government's exhibits, and thus the exhibits were relevant to the determination whether Moser was involved in the conspiracy. Moser has failed to show that the district court abused its discretion in admitting these exhibits. This issue is without merit.[9]

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[9] Wilkins also claims that the court improperly excluded evidence regarding his "credit for credit" defense. The record reveals that this defense was propounded at length, and the district court properly excluded some of the evidence as cumulative.

D. JURY INSTRUCTIONS

(1) Deliberate Ignorance Instruction

The district court charged the jury that: "While knowledge on the part of a Defendant cannot be established merely by demonstrating that he was negligent, careless, or foolish, knowledge can be inferred if he deliberately blinded himself to the existence of a fact." Gandy contends that this instruction was not warranted by the evidence.

"A district court has broad discretion in framing the instructions to the jury and this Court will not reverse unless the instructions taken as a whole do not correctly reflect the issues and law." *United States v. McKinney*, 53 F.3d 664, 676 (5th Cir.) (citation and internal quotation omitted), *cert. denied*, 116 S.Ct. 261 (1995). "The purpose of the deliberate ignorance instruction is to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge." *Id.* (citation and internal quotation omitted). "It should only be given when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate indifference." *Id.* at 676-77. In the instant case, both of those requirements were met.

At trial, Gandy claimed a lack of guilty knowledge: he believed that he was simply refinancing his loans through the use of the CMOs and CBCs. In regard to an inference of deliberate indifference, the evidence from the USA First packet established that Gandy was subjectively aware of a high probability of illegal conduct. The packet described the CMOs as "pretend" money and advised that they could be used to satisfy actual debts. Materials

in the packet further advised threatening and harassing anyone who questioned the CMOs validity. Despite this overwhelmingly suspicious scheme, Gandy made no further inquiry as to the CMOs validity, thus supporting an inference of deliberate indifference on Gandy's part. The district court did not abuse its discretion in giving the deliberate indifference charge.

(2) Mail Fraud Instruction

In regard to the mail fraud instruction, the district court charged the jury that, to find a defendant guilty, the Government must prove beyond a reasonable doubt that:

> First: That the Defendant knowingly created or participated in a scheme to defraud, as alleged in the Indictment which is hereby referenced;
>
> Second: That the Defendant acted with a specific intent to commit fraud.
>
> Third: That the Defendant mailed something or caused another person to mail something for the purpose of carrying out or attempting to carry out the scheme.

The court further instructed the jury that "[a] 'scheme to defraud' includes any scheme to deprive another of money, property, or of the intangible right to honest services by means of false or fraudulent pretenses, representations, or promises" and that "[a] representation may be 'false' when it constitutes a half truth, or effectively conceals a material fact, provided it is made with the intent to defraud."

All six appellants argue that "materiality" is an essential element of the mail fraud statute, and therefore the

district court erred in failing to submit the question of materiality to the jury. Appellants argue that although materiality is not expressly mentioned in the mail fraud statute, 18 U.S.C. § 1341, such an element should be implied.[10]

They rely on the Supreme Court's holding in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995), that if materiality is an element of the offense, the question must be submitted to the jury along with the other essential elements.[11] In *Gaudin*, which involved the offense of making a false statement in violation of 18 U.S.C. section 1001, the Supreme Court simply assumed that materiality was an element of the crime because the issue was uncontested.

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[10] They are vague, however, as to how materiality relates to the elements of mail fraud. Some of the appellants seem to imply that each mailing must contain a material misrepresentation. We disagree. Our precedent makes clear that each mailing does not even have to be fraudulent in itself. *United States v. Shively*, 927 F.2d 804 (5th Cir. 1991). Therefore, if materiality is an element, the question would be whether the scheme to defraud involved material misrepresentations or omissions. *Cf. United States v. Cochran*, 109 F.3d 660, 667-68 n.3 (10th Cir. 1997) (explaining that although materiality is not an independent element of *wire fraud* prosecution, "fraud has always required that misrepresentations or omissions be material to be actionable").

[11] A material statement was defined as having " 'a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed.' " *Gaudin*, 115 S.Ct. at 2313 (brackets in opinion) (quoting *Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 1546 (1988)).

Prior to *Gaudin*, in the context of a civil RICO claim, this Court explained that materiality was not an element of the offense of mail fraud. *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988), *vacated on other grounds*, 492 U.S. 914, 109 S.Ct. 3236 (1989). Since *Gaudin*, in the context of determining whether the evidence was sufficient to sustain a mail fraud offense, this Court has assumed without deciding that materiality was an element of the offense of mail fraud. *United States v. Manges*, 110 F.3d 1162, 1174 (5th Cir.), *petition for cert. filed*, (No. 97-315) (Aug. 19, 1997).

Acknowledging that there was no objection to the instruction,[12] the appellants argue that the omission constituted plain error. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). The first step in the *Olano* plain-error analysis is to determine whether the district court's lack of a materiality instruction constituted error.

As this Court did in *Manges*, we assume for purposes of this appeal that materiality is an element of mail fraud, and thus, the district court's failure to submit it to the jury constituted error, which satisfies the first prong of *Olano*.

In regard to the second prong, we must determine whether the error is "plain." In *Olano*, the Supreme Court opined that the error must be plain "under current law," but did not decide whether that was at the time of trial or on appeal. Recently, the Supreme Court clarified that

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[12] In his brief, although Johnston correctly states that he adopted the objections of his codefendants to the court's charge, none of his codefendants made this objection.

"where the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 117 S.Ct. 1544, 1549 (1997).

As set forth above, prior to *Gaudin*, this Court opined that materiality is not an element of mail fraud. *Abell; see also United States v. Faulhaber*, 929 F.2d 16, 18 (1st Cir. 1991) (rejecting argument that jury should have received materiality instruction because the only issue is whether there is a scheme or artifice intended to defraud). More importantly, subsequent to *Gaudin*, this Court has yet to hold that materiality is an element of the mail fraud statute. It is clear to us that the error is not "plain" under current law, that is, at the time of appellate consideration. *See Johnson*, 117 S.Ct. at 1549. As such, the appellants are constrained from showing that the mail fraud instruction constituted plain error.

E. DISMISSAL OF JUROR

During the instant trial, Wilkins' wife was arrested as she attempted to carry a loaded handgun through a security checkpoint at the courthouse. Based on this incident, a motion for mistrial was filed. The district court held a hearing and thereafter dismissed one juror who had been observed in the vicinity of the security checkpoint around the time Mrs. Wilkins was stopped.

Gandy, Wilkins, Moser, and O'Neill contend that the district court erred in failing to question either the dismissed juror or the remaining jurors to determine whether any other juror had witnessed the incident. We are not persuaded. The appellants' assertion that another

juror might have witnessed the incident is pure conjecture.

During the hearing, one of the defense attorneys testified that when Wilkins' wife was stopped at the checkpoint it seemed like the normal every-day search procedure, and he surmised that the jurors did not know what was going on either. As stated by the district court, "[a] board-certified criminal defense attorney with over twenty years in trial experience did not know what was happening until he 'squeezed it out of the security guards.' " After listening to the evidence, the district court concluded that the safest course of action was to dismiss the one juror who had been identified without questioning other jurors and risking undue emphasis on the matter. The court's final instructions to the jury provided that anything seen or heard outside the courtroom was not evidence and must be entirely disregarded.[13] We conclude that the district court did not abuse its discretion in its handling of the allegation of outside influence on the jury. *See United States v. Ramos*, 71 F.3d 1150, 1153-54 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1864 (1996).

F. JOINDER AND SEVERANCE

1. JOINDER

Relying on Rule 8(b) of the Federal Rules of Criminal Procedure, Gandy argues that he was misjoined for trial with the other defendants because the allegations in the indictment and the evidence at trial demonstrated not

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[13] Additionally, the court instructed the jury throughout the trial not to partake of any media coverage of the trial.

one single conspiracy, but rather two or more separate and distinct conspiracies. At a minimum, Gandy argues, there were two conspiracies: the first involving the issuance of CMOs and CBCs by Leonard Peth, operating as L.A. Pethahiah/Family Farm Preservation, in Tigerton, Wisconsin; and the second involving the issuance of CMOs and CBCs by Johnston and O'Neill, operating as O.M.B.-W.D. McCall, in Waxahachie, Texas.

"To determine whether an indictment charges separate conspiracies or a single conspiracy, we consider whether the alleged facts reveal a substantial identity of facts or participants. A single conspiracy can be found when the indictment adequately shows a singular conspiratorial objective. . . . " *United States v. Lindell*, 881 F.2d 1313, 1318 (5th Cir. 1989), *cert. denied*, 493 U.S. 1087, 110 S.Ct. 1152 (1990). Simply because the indictment does not charge each defendant "with active participation in each phase of the conspiracy does not constitute misjoinder." *Id.*

In the instant case, the indictment alleged the following scheme:

> The defendants would issue or cause to be issued worthless certified money orders made payable to private citizens, banks, mortgage companies, and other financial institutions and creditors. The worthless certified money orders would be used to pay off personal and consumer debts, forestall foreclosure of property, and acquire real and personal property, or title thereto, free and clear of any encumbrances.

> The defendants would direct the creditor to forward the worthless certified money order to the issuer to be redeemed at full face value.
>
> The issuer, upon receiving the worthless certified money order from the creditor, would issue a worthless certified banker's check in the same amount as the worthless certified money order and send the worthless certified banker's check back to the creditor. L.A. Pethahiah and O.M.B., W.D. McCall were fictitious names used by the issuers.
>
> The defendants would demand that the creditor "zero balance" their accounts and threaten legal action, including filing liens against the creditors and criminal prosecution, if the worthies certified money orders or banker's checks were not accepted as full payment of the debt and would file liens against and sue creditors, their employees, government officials and others to intimidate and harass them and cloud the title to properties.

Although the scheme set forth in the indictment and the evidence at trial did involve the issuance of CMOs and CBCs from both L.A. Pethahiah and O.M.B.-W.D. McCall, we are satisfied that there was only one conspiracy charged and proved. The Government did not attempt to prove that the defendants conspired with the persons involved in the scheme in Wisconsin. The evidence established that O'Neill obtained the information and materials from the Wisconsin operation and gave them to Johnston, who had Wilkins examine them. Johnston then constructed a packet based on the information from the Wisconsin materials. The packet sent out by

Johnston referenced Family Farm Preservation in Tigerton, Wisconsin. The evidence indicates that the materials from Wisconsin were used to launch this scheme and thereafter were duplicated. In short, the evidence supports the Government's theory of a single, overarching conspiracy, rendering joinder appropriate. *Lindell*, 881 F.2d at 1318.

2. SEVERANCE

Johnston, Wilkins, Dollar, Gandy, and Moser argue that the district court erred in refusing to hold separate trials. Under Rule 8(b) of the Federal Rules of Criminal Procedure, the initial joinder of the appellants for trial was legitimate because they were charged with having conspired with each other.[14] *United States v. Elam*, 678 F.2d 1234, 1250 (5th Cir. 1982). The district court's decision of whether to grant a severance under Rule 14 because of prejudice is reviewable only for an abuse of discretion. *United States v. Stotts*, 792 F.2d 1318, 1321 (5th Cir. 1986); see also *United States v. Salomon*, 609 F.2d 1172, 1175 (5th Cir. 1980) (to establish an abuse of discretion of the district court, a defendant must show that he received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection). An appellant must demonstrate something more than the fact that a separate trial might offer him a better chance of acquittal. *United States v. Berkowitz*, 662 F.2d 1127, 1132 (5th Cir. 1981).

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[14] As discussed above, we reject Gandy's argument that he was improperly joined with the other defendants because there were two separate conspiracies.

(a) Dollar

The district court denied the severance motion, opining that the defendants' defenses were not mutually antagonistic. Dollar concedes that this was true to a certain extent "because each defendant, to some degree, contended that he believed in the USA First material and did not possess an intent to defraud." He claims, however, that the defenses presented by the six appellants fell into two distinct categories. Dollar asserts that, besides offering the defense of lack of intent, he argued to the jury that he had been duped by Wilkins, Johnston, and O'Neill "into believing that the USA First program would work." Dollar argues that he was prejudiced because "if the jury disbelieved the principals with respect to their protestations that they believed in the USA First program and possessed no intent to defraud, the jury would also convict [him], disregarding his further defense that he was duped into using the program by O'Neill, Johnston, and Wilkins." We disagree for two reasons. First, the jury could have rejected the defense of O'Neill, Johnston, and Wilkins and still believed that Dollar was duped by them. Second, and perhaps more importantly, on cross examination, Dollar testified that Johnston was enthusiastic about and believed in the validity of using the CMOs. Dollar's testimony also indicated that he thought Wilkins believed the CMOs were legal. Under those circumstances, Dollar's defense is not in conflict with the other defendants.

(b) Moser

Moser argues that the district court erred because there were two groups of defendants, the principals

(Johnston, O'Neill, and Wilkins), and the group in which he fell, users of the packets. The first group's defense was defending the program. On the other hand, his defense was that the first group of defendants kept him in the dark regarding the illegality of the CMOs. Moser argues that his defense conflicted with the first group's defense and that his attorney "specifically rejected trying to defend the allegations the way Mr. Johnston and Mr. Wilkins chose to do, i.e. defending the packet." These defenses are not necessarily conflicting in that the jury's rejection of the first group's defense does not inexorably lead to a rejection of Moser's. Also, as in Dollar's case, we are not convinced that Moser actually attempted at trial to point a finger at the first group. Upon inquiry by the court, Moser stated that he did not think that the people at USA First deceived him or "tried to hide the ball" from him. In any event, in light of the fact that the jury acquitted Moser of the conspiracy count and one substantive count of mail fraud, Moser cannot show compelling prejudice.

(c) Johnston

Johnston argues that he was prejudiced by certain evidence that would not have been admissible if a severance had been granted. Johnston points to Moser's testimony that USA First (Johnston's company) did not inform him that the Texas Department of Banking had issued a cease and desist order and that the CMOs could be illegal. Johnston ignores that the cease and desist order would have been admissible against Johnston in a separate trial. Even assuming *arguendo* that some of the complained of evidence would not have been admissible in a

separate trial, "Severance is not required merely because the government introduced evidence admissible against certain defendants." *United States v. Walters*, 87 F.3d 663, 671 (5th Cir.) (internal quotation marks and citation omitted), *cert. denied*, 117 S.Ct. 498 (1996). Johnston cannot show compelling prejudice. This is especially true in light of the district court's frequent instructions to the jury to consider the evidence as to each defendant separately and individually,[15] Johnston has failed to show the district court abused its discretion in denying his severance motion.

(d) Wilkins

Wilkins generally argues that his defense was different from the others but does not elaborate. Thus, he has utterly failed to show the compelling prejudice required. In any event, as set forth above, we conclude that the district court's instructions were sufficient to cure any possible prejudice. *Walters*, 87 F.3d at 671.

(e) Gandy

Gandy argues that even if his initial joinder with the other appellants for trial was proper, the district court erred in denying his motion for severance because he

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[15] This Court has held that, even when two defendants accuse each other of the crime for their respective defenses, severance is not warranted when the court instructs the jury to consider the evidence as to each defendant separately and individually. *United States v. Walters*, 87 F.3d 663, 671 (5th Cir. 1996).

suffered compelling prejudice from the evidence introduced against his codefendants. In view of the previously mentioned instructions given by the district court and the jury's *acquittal* of Gandy on the conspiracy count, he has not shown compelling prejudice. In conclusion, the district court did not abuse its discretion in denying the motion for severance.

G. SENTENCING

Dollar and Wilkins argue that the district court erred in assessing their offense levels. Under U.S.S.G. § 2F1.1, a defendant's base offense level is increased according to the amount of loss caused by his fraud. A district court's finding of amount of loss is reviewed for clear error. *United States v. Hill*, 42 F.3d 914, 919 (5th Cir.), *cert. denied*, 116 S.Ct. 130 1995).

The commentary to § 2F1.1 provides some guidance:

> [I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. . . . For example, if the fraud consisted of selling or attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the loss would be $40,000.

§ 2F1.1, comment. (n.7).

Dollar's presentence report (PSR) provided that the loss intended by Dollar was $704,000, which is the face value of the worthless CMOs that Dollar had caused to be issued. Wilkins' PSR provided that the loss intended by Wilkins was $61 million. That figure is the total amount

of CMOs issued pursuant to the scheme. The district court found that amounts attributed to Dollar and Wilkins in their respective PSRs were accurate.

Relying on the fact that there was no actual loss in the instances in which they personally used (or when Wilkins assisted others in using) the CMOs, Dollar and Wilkins argue that there was insufficient evidence to prove that they did not intend to repay the loans. "When reviewing the calculation of an intended loss, we look to actual, not constructive, intent, and distinguish between cases in which 'the intended loss for stolen or fraudulently obtained property is the face value of that property' and those in which the intended loss is zero because 'the defendant intends to repay the loan or replace the property.' " *Id.*

The Government asserts that the district court's findings regarding the amount of intended loss are consistent with the jury's verdict that the appellants were liable for intentionally participating in a scheme to defraud creditors by sending creditors bogus CMOs. Although we recognize that the appellants ultimately paid their loans, in view of their previous attempts to coerce the institutions to accept the bogus money orders, one is not left with the definite and firm conviction that the district court made a mistake regarding their intent to defraud. Thus, the findings regarding the amount of loss the appellants intended cannot be deemed clearly erroneous.[16]

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[16] Wilkins also purports to challenge an upward departure from the guideline range by the district court. Wilkins is

H. BIAS

Wilkins asserts that the judge was biased because he felt threatened by Wilkins. Immediately prior to sentencing Wilkins, the court advised him of its concerns and gave Wilkins an opportunity to seek a recusal. Wilkins declined. As such, Wilkins's complaint is either waived or untimely. *Cf. United States v. York*, 888 F.2d 1050 (5th Cir. 1989) (finding untimely a motion for new trial based on disqualification of judge when defendant previously aware of circumstances alleged as basis for disqualification).

With respect to the remaining arguments of the appellants, we have considered briefs and arguments of counsel and the pertinent parts of the record, and conclude there is no error requiring reversal.

For the above reasons, the convictions and sentences of Johnston, Wilkins, O'Neill, Dollar, Moser and Gandy are AFFIRMED.

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mistaken. The district court did not depart from the guideline range. It appears that Wilkins is challenging the district court's decision to assess four points (as opposed to the two points recommended in the PSR) for his role in the offense under U.S.S.G. section 3B1.1(a). In light of the evidence adduced at trial, Wilkins has not shown that the district court clearly erred in finding that Wilkins was an organizer or leader. *United States v. Barreto*, 871 F.2d 511, 512 (5th Cir. 1989).

APPENDIX B

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

APPENDIX C

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX E

CHANNEL 8 NEWS REPORT

6:00 Friday, December 8, 1995

[Introduction]: A defendant's wife at a fraud trial involving bogus money orders allegedly tries to smuggle a gun into the Dallas federal courthouse. The attempted breach of security tops our news at 6.

[Gloria Compost]: Good evening everyone, and thank you for joining us. The smuggled gun was the latest development in a bizarre case of fraud involving millions of dollars in worthless money orders. The wife of one of the six men currently on trial caused tightened security at the federal courthouse today. Channel 8's Robert Riggs reports.

[Robert Riggs]: Federal prosecutors say 45 year-old Valerie Wilkins tried to smuggle a handgun into the fraud trial of her husband Waxahachie attorney Jerry Wilkins. The security scare at the Earl Cabell Federal Building in Dallas underscores concerns about the 61 million-dollar bogus money order case against tax protesters. Court security officers discovered a 38-caliber revolver loaded with high-powered rounds in Mrs. Wilkins' purse as she and her husband tried to enter court. In Mrs. Wilkins' detention hearing, a federal agent testified that the gun was concealed from X-Ray detection by silver dollars and metal cosmetic containers but an officer spotted the gun's trigger guard sticking out. Assistant U.S. Attorney David Finn strongly urged a federal magistrate to keep Mrs. Wilkins behind bars in order to protect the security of the judge and prosecutors in her husband's case as well as other perceived enemies. When the gun was discovered,

Mrs. Wilkins said to her husband, "I'm sorry honey, but I forgot". Mrs. Wilkins told arresting officers she carried the weapon for self-protection. Jerry Wilkins has been on trial for two weeks with five other defendants for allegedly issuing worthless money orders. The gun smuggling incident followed prosecutor Tom Hamilton's grilling cross-examination of Wilkins on Thursday. Federal authorities say Mrs. Wilkins appeared visibly upset by the tough questioning. The federal magistrate ordered the release of Mrs. Wilkins but banned her from the federal building for the duration of her husband's trial and ordered her to avoid contact with the federal judge, prosecutors and jury members. At this hour, prosecutors are trying to get another judge to overrule the release and hold Mrs. Wilkins behind bars. Gloria?

[Gloria Compost]: So we know what happened to her, what happened in Jerry Wilkins, her husband?

[Robert Riggs]: As a result of the incident uh, his bond was revoked, he's now being held behind bars and we should remind everybody that carrying a weapon into a federal facility is punishable by a maximum of two years in prison.

CHANNEL 8 NEWS REPORT
10:00 Friday, December 8, 1995

[Tracy Rowlett]: Next up tonight, an attempt to smuggle a gun into an emotionally charged trial will tighten security at the Dallas federal courthouse. Marshals arrested the wife of a tax protester in a bizarre case involving millions of dollars in worthless money orders.

Channel 8's Robert Riggs reports that federal authorities believe the judge and prosecutors were in danger.

[Robert Riggs]: Federal prosecutors say Valerie Wilkins tried to smuggle a gun into the trial of controversial tax protesters. She's the wife of Waxahachie attorney Jerry Wilkins. He's at the center of fraud and conspiracy charges involving 61 million dollars in bogus money orders.

[Paul Coggins]: That is a federal felony to bring it into the courthouse at all uh, this person got all the way up to the 16th floor with that uh, gun . . .

[Robert Riggs]: Court security officers barely spotted the trigger guard of a 38 revolver in Mrs. Wilkins' purse. Silver dollars and metal cosmetics containers partially obscured the X-Ray. The gun was loaded with five hydro-shock bullets known for inflicting severe wounds.

[Paul Coggins]: I've communicated our concerns to the Attorney General, she's concerned about it and what we hope to do is get some monies for security and be allowed to put uh, metal detecting devices on the ground floor instead of uh, just the upper floors.

[Robert Riggs]: A federal prosecutor strongly urged the magistrate to keep Mrs. Wilkins behind bars because she posed a danger to the safety of the judge and prosecutors in her husband's trial. Assistant U.S. Attorney Tom Hamilton had grilled Jerry Wilkins on the stand Thursday. Mrs. Wilkins appeared visibly angry but she claims the gun was for her self-protection and forgot it was in her purse. Judge Barefoot Sanders barred Mrs. Wilkins from coming within a block of the federal courthouse and

ordered her to turn over all of the family's guns and ammunition to federal authorities. The incident has also heightened concerns about the need for moving metal detectors of the federal court building. Robert Riggs, Channel 8 News, Dallas.

[Tracy Rowlett]: As a result of today's incident, a judge has revoked Jerry Wilkins' bond and tonight Wilkins is behind bars.

APPENDIX F

Metropolitan

Saturday,
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The Dallas Morning News
Woman with gun arrested outside courtroom

By Bill Lodge
Staff Writer of The Dallas Morning News
Her husband is on trial; she says she forgot about weapon

The wife of a man on trial for mail fraud was arrested outside a Dallas courtroom Friday after an X-ray device revealed a loaded .38 caliber revolver in her purse.

Valerie Nuanez Wilkins, wife of Dallas lawyer Jerry Lynn Wilkins, was charged with illegally taking a firearm into the Earle Cabell Federal Building.

In separate hearings after her arrest, she told U.S. Magistrate Judge Jeff Kaplan and U.S. District Judge Barefoot Sanders that she carries the gun for protection and simply forgot to remove it before entering the courthouse for her husband's trial.

A prosecutor expressed doubt about that explanation. "We don't believe that this was inadvertent," said Assistant U.S. Attorney David Finn. "She came close to smuggling a weapon into . . . court."

Only the trigger and part of the trigger guard showed up on the detector's screen, a federal agent testified.

Special Agent Stephen M. Stokes of the Federal Protective Service testified that the gun was loaded with five hollow-point rounds that would cause "extreme damage to the body on impact."

Agent Stokes also testified that Ms. Wilkins had referred to federal prosecutors, federal agents and U.S. District Judge Joe Kendall, who is presiding over her husband's trial, as "the enemy" and said, "I pray for the enemy."

Jill Bindler, an assistant federal public defender representing Ms. Wilkins, said her client's comments merely reflect her deep religious convictions.

Ms. Bindler said Ms. Wilkins had no intent to harm any federal official. She has received threatening telephone calls and "is fearful because of the crime rate in this area," Ms. Bindler said.

Ms. Bindler also noted that Ms. Wilkins has no criminal record.

For two weeks, her husband and five other men have been on trial on charges of printing their own money orders and using them to pay off mortgages and other debts. Members of the group contend that federal law permits them to eliminate their debts that way.

Prosecutors contend that the men simply tried to bilk mortgage companies and banks while flooding the nation's monetary system with $61 million in worthless money orders.

Mr. Finn, the prosecutor, asked Judge Kaplan and then Judge Sanders to jail Ms. Wilkins pending further court proceedings in her case. Both judges refused,

although they banished her from the Earle Cabell Building.

> "We don't believe that this was inadvertent. She came close to smuggling a weapon into . . . court."
>
> – *David Finn, assistant U.S. attorney*

Judge Sanders ruled that she may come no closer than one block from the federal courthouse until her husband's trial is over – and then only after receiving court permission.

In addition, Judge Sanders ordered Ms. Wilkins to remove several handguns, two rifles and a number of shotguns from her home by noon Saturday.

Although the incident did not result in Ms. Wilkins' immediate incarceration, it did prompt the jailing of her husband.

Judge Kendall, who is presiding at the trial, ordered the lawyer's bond revoked after his wife's gun was confiscated on the 16th floor of the courthouse.

U.S. attorney Paul Coggins said the case illustrates a need for metal detectors on the ground floor of the federal courthouse. Only the top four floors of the 16 story building have the equipment now.

The need for courthouse security has been underscored in the Dallas area by two deadly incidents in recent years. On July 1, 1992, George Lott opened fire in the state appeals court in Fort Worth, killing two lawyers

and wounding three other people, including two judges. And in January 1993, Hai Van Huynh gunned down his estranged wife in a crowded hallway at the George L. Allen Courts Building in Dallas before killing himself.

Mr. Wilkins' trial resumes Monday. A preliminary hearing in Ms. Wilkins' case is scheduled for Dec. 18.